No. 44891-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

ERIC CHRISTOPHER MARTIN

BRIEF OF APPELLANT

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Assignment of Errors

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3. The trial court's limiting instruction constituted an impermissible comment on the evidence.

4. The prosecutor's closing rebuttal argument falsely accusing defense counsel of accusing the victim of being a liar was flagrant and ill-intentioned prosecutorial misconduct.

5. Mr. Martin's multiple convictions for second degree assault and harassment constitute same criminal conduct.

Issues Pertaining to Assignment of Errors

1. Mr. Martin grabbed Ms. Wilson around the neck, let go, and instantly grabbed her a second time. For this he was convicted of two counts of second degree assault. Do the two convictions violate his right to be free from double jeopardy?

2. Shortly after grabbing her twice by the neck, Mr. Martin pushed Ms. Wilson down, resulting in a conviction for fourth degree assault. Does this conviction violate his right to be free from double jeopardy?

3. The trial court gave a ER 404(b) limiting instruction that permitted the jury to consider prior assaultive acts for the purpose of understanding potential domestic violence. Did this limiting instruction impermissibly comment on the evidence?

4. Did the prosecutor's closing rebuttal argument falsely accusing defense counsel of accusing the victim of being a liar constitute flagrant and ill-intentioned prosecutorial misconduct?

5. During the course of the assaultive behavior, Mr. Martin threatened to kill Ms. Wilson, resulting in convictions for both second degree assault and harassment. Should the Court have treated these offenses as same criminal conduct?

B. Statement of the Facts

Malory Wilson and Eric Martin previously had an on again-off again boyfriend/girlfriend relationship. RP, 211. In July of 2012, they decided to try and "work things out" and started seeing each other nearly every day. RP, 211.

On July 15, 2012, they had a date that lasted most of the day and finished with them going to Ms. Wilson's residence to watch a movie and cuddle. RP, 213. Mr. Martin was drinking vodka shots. RP, 213. Ms. Wilson testified at trial she was not drinking, but admitted that on earlier occasions she had stated she had one drink. RP, 213. There was also cocaine in the house and both Mr. Martin and Ms. Wilson consumed cocaine together. RP, 214. Ms. Wilson admitted to snorting between two and three lines of cocaine. RP, 283. Eventually, the two of them got into bed together and fell asleep by the fireplace. RP, 215-16.

Ms. Wilson woke up at around 4:00 a.m. and was surprised to discover Mr. Martin was not in the bed with her. RP, 216. She went to look for him and found him in the bathroom. RP, 217. When she opened the bathroom door, Mr. Martin was holding tinfoil, a lighter, and a straw. RP, 217. Ms. Wilson immediately concluded Mr. Martin was trying to turn cocaine into crack cocaine and smoke it. RP, 217. Ms. Wilson

freaked out because, according to her testimony, she had not realized until that point "how bad it was." RP, 218. She ordered Mr. Martin out of her house. RP, 219.

At that point, according to Ms. Wilson, Mr. Martin freaked out. RP, 219. He grabbed Ms. Wilson by the neck using two hands and slammed her against the glass shower door. RP, 219. He lifted her off the floor and slammed her a couple of times and then let go, causing her to drop to the ground. RP, 220. Ms. Wilson said she could breathe but her vision started to get blurry. RP, 221. He then "instantly" grabbed her a second time with one hand across the front of her neck, pinching her neck to the point where she could not breathe. RP, 221. Then, as suddenly as the attack started, Mr. Martin let go stopped. RP, 222.

Ms. Wilson went to her phone and Mr. Martin knocked it from her hands. RP, 222. Ms. Wilson tried several times to pick up her phone and "call the cops," but Mr. Martin repeatedly prevented her, saying, "I'm not going to jail. I'm not going to let you call the cops." RP, 223. Mr. Martin then grabbed the phone and left the room. RP, 223. Within seconds of leaving, Mr. Martin returned to the bathroom, grabbed Ms. Wilson with two hands by the throat, and said, "I'm gonna kill you before I go to jail."

RP, 224. Ms. Wilson believed Mr. Martin was capable of killing her if she persisted in calling the police. RP, 231 Mr. Martin then left the house. RP , 232

As soon as Mr. Martin left the house, Ms. Wilson promptly dead bolted the door and went to the kitchen to retrieve her purse. RP, 232. When she looked back, she observed Mr. Martin kick in the door, reenter the house, grab her, and throw her to the ground. RP, 232. She then saw him rummage through her purse and she believes he removed a sum of money. RP, 232-33.[1] He held her down and was screaming at her. RP, 236. He then left a second time RP, 239. Ms Wilson retrieved her phone and started dialing her best friend. RP, 239 She also tried to contact a neighbor. RP, 239. Then she called the police RP, 240. A copy of the 911 call was played for the jury. RP, 244.

Five prior incidents of assaultive behavior allegedly perpetrated by Mr. Martin were admitted pursuant to ER 404(b). RP, 58. Ms. Wilson described each of these prior incidents in her testimony. The first was an incident a couple of months into their relationship when he grabbed her and threw her onto the bed RP, 225. The second incident was in Portland

[1] Mr. Martin was charged with robbery for allegedly taking money from her purse, but the jury acquitted him of this charge.

and Mr. Martin showed up unexpectedly and broke into her father's garage. RP, 226. A third incident involved an argument at his mom's house that escalated into him throwing her in the living room, causing her to hit her head on a chair. RP, 227. Then he grabbed her head and neck and threatened to kill her. RP, 228. Next, he held her down and "smacked" her probably fifteen times. RP, 228. A fourth incident occurred at the Green Briar house in Portland when Ms. Wilson came home late. RP, 229. Because she did not want to engage with Mr. Martin, she decided to sleep on the couch. RP, 229. But Mr. Martin grabbed her by the arm, dragged her into the bedroom, and put her into a choke hold to the point she could not breathe. RP, 229. The fifth incident also occurred at the Green Briar house. RP, 230. During an argument, Ms. Wilson went into the bathroom and called her father to come over. RP, 230. Mr. Martin was banging on the door, threatening to kill her. RP, 230.

There was much discussion of whether a limiting instruction was appropriate. RP, 59, 320. The Court invited defense counsel to propose a limiting instruction to be given at the time of the admission of the 404(b) evidence. RP, 60. Defense counsel did propose an instruction. It read, "This evidence consists of prior allegations that may be considered by you for the purpose of understanding potential domestic violence." RP, 71. The defense requested the instruction be given either immediately prior to

or right after the admission of the 404(b) evidence. RP, 71. The State objected to the instruction because they believed it was too narrow in scope. RP, 72. The State requested the instruction also include language about the reasonableness of Ms. Wilson's fear. RP, 71. The defense objected and stated it preferred no instruction be given at all rather than the State's proposed instruction. RP, 72.

The issue of a limiting instruction came up again at the conclusion of the evidence. The Court wanted the limiting instruction to encompass the court's ruling without being a comment on the evidence. RP, 325. The instruction given by the Court read, "Certain evidence has been admitted in this case for a limited purpose. This evidence consists of prior allegations and may be considered by you only for the purpose of understanding potential domestic violence and the victim's state of mind. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation" RP, 340-41. Mr. Martin did not object to this instruction. RP, 333.

At closing argument, the prosecutor made the following argument regarding the two counts of second degree assault. "The next crimes we have are Assaults in the Second Degree. And we have charged this two times so I'm going to talk about each. So we've charged for two

incidences. Both in the bathroom – the first one when he uses two hands on her neck and then the second charge is for when he uses one. So those are the two times." RP, 362.

During defense counsel's closing argument, defense counsel pointed out a variety of inconsistencies between Ms. Wilson's trial testimony and her earlier statements. RP, 373-80. Defense counsel never argued Ms. Wilson was lying; he simply argued that due to inconsistencies in the evidence, the State had failed to prove the case beyond a reasonable doubt. Relevant to this appeal, defense counsel made the following comments regarding Ms. Wilson's cocaine use, "Her use of cocaine – similarly – when she reported the 9-1-1 she didn't say anything about drugs being used by anyone. She didn't say anything about her cocaine use to Office Haske when Officer Haske came to the scene. She didn't say anything about her cocaine use when Detective Bachelder came to the scene several days later – on the 20th just prior to the defense interviews – because we knew she'd been using cocaine -- she discloses to the Prosecuting Attorney. I think she says one line and she calls it snorting a line of cocaine. But what we do know is that she testified here at a preliminary hearing and before this jury – before you – she says "Yes I did multiple lines of cocaine." RP, 374.

In its rebuttal argument, the State started by saying: "Defense counsel comes up here and attacks the victim because that is what he can do in his case." RP, 380 Later the State argues, "And he says she is a liar – can't believe her because she didn't disclose to the cops that she was using cocaine the day before. That is ridiculous. It is ridiculous to think that she's a liar because when the cops come to her house, she's been assaulted, she's been threatened, she thinks he's coming back The first think [sic] she should do is say Officer, by the way – I illegally used drugs yesterday. Why on earth would she do that?" RP, 382.

During deliberations, the jury sent the court a question, "Please legally differentiate between Counts Number Three and Number Four, the current wording is identical." RP, 397. Counts three and four are the two counts of second degree assault. After much discussion, the Court declined to answer the question, simply responding, "Please refer to the instructions already given." RP, 395-99.

The jury convicted Mr. Martin of first degree burglary, second degree assault, second degree assault, harassment – death threats, fourth degree assault, and third degree malicious mischief. There was a special verdict form which asked, "Were Eric Christopher Martin and Malory

Wilson members of the same family or household?" The jury answered, "No." RP, 404.

Sentencing was held on May 15, 2003. Mr. Martin has one prior conviction in Oregon for Criminal Mischief in the First Degree, which the trial court found to be comparable to Malicious Mischief in Washington. RP, 419. At sentencing, Mr. Martin's counsel made a confusing objection to the fact that he was convicted of two counts of second degree assault. RP, 425. He said, "Although the court doesn't have the authority to say the two Assault II's should only count as one, that's not the law. . . . The jury even had a question – was this an on-going criminal conduct? The jury came back and said I don't understand why there's two charged there under the Assault II." RP, 425.

C. Argument

1. Mr. Martin's two convictions for second degree assault violate double jeopardy.

The double jeopardy clause protects a person from being twice convicted of the same offense. U.S. Constitution, Amendment V. When evaluating whether two convictions constitute the same offense, courts

must determine whether they are the same offense in both law and in fact. State v. Chesnokov, 175 Wash.App. 345, 305 P.3d 1103 (2013), citing Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932). In this case, Mr. Martin was convicted of two counts of second degree assault, so there can be no dispute he was convicted twice of the same offense as a matter of law.

The remaining question is whether the two offenses are the same as a matter of fact. In State v. Adel, 136 Wash.2d 629, 965 P.2d 1072 (1998) the Supreme Court said:

> When a defendant is convicted for violating one statute multiple times, the same evidence test will *never* be satisfied. As previously mentioned, the same evidence test asks whether the convicted offenses are the same in law and the same in fact. Two convictions for violating the same statute will always be the same in law, but they will never be the same in fact. In charging two violations of the same statute, the prosecutor will always attempt to distinguish the two charges by dividing the evidence supporting each charge into distinct segments.

Adel at 633-34. Instead, when a person is convicted multiple times of the violating the same statute, the Courts look to determine the proper unit of prosecution.

The Supreme Court analyzed the unit of prosecution for assault in the case of State v. Tili, 139 Wash.2d 107, 985 P.2d 365 (1999). In Tili the defendant was convicted of multiple counts of rape for multiple acts of

sexual penetration. The defendant likened the multiple penetrations to a person convicted of multiple assaults for throwing multiple punches in a fist fight. The Supreme Court found the comparison inapt.

> Unlike the rape statute, the assault statute does not define the specific unit of prosecution in terms of each physical act against a victim. Rather, the Legislature defined assault only as that occurring when an individual 'assaults' another. A more extensive definition of 'assault' is provided by the common law, which sets out many different acts as constituting 'assault,' some of which do not even require touching. Consequently, the Legislature clearly has not defined 'assault' as occurring upon any physical act.

Tili at 116.

Turning to the facts of this case, the State's theory was that two assaults occurred, both in the bathroom, when Mr. Martin first grabbed Ms. Wilson on the neck with two hands, then with one. See State's Closing Argument, RP, 362. But these two assaults each occurred in quick succession. Ms. Wilson described the two events as one continuous attack, analogous to multiple punches thrown in a fist fight. According to her description, he was holding her by the neck with both hands when "[h]e dropped me. And then – but like instantly came right back at me with one hand on my neck – right here." RP, 221. These two assaults constitute a single unit of prosecution and one count must be dismissed.

2. Mr. Martin's conviction for fourth degree assault violates double jeopardy.

Mr. Martin was also convicted of one count of fourth degree assault for the unlawful touching that occurred when he pushed Ms. Wilson down. Fourth degree assault, as a lesser included offense, is legally the same as second degree assault Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S Ct 180 (1932).

According to the testimony, Mr Martin released Ms Wilson and left the house. She dead bolted the door and went to the kitchen to retrieve her purse. In the time it took to walk to the kitchen, Mr. Martin busted in the door, entered the house, and threw her to the floor. For the same reasons discussed above, this assault is part of the same unit of prosecution as the overall assault and should also be dismissed.

3. The trial court's limiting instruction constituted an impermissible comment on the evidence.

A claim of an impermissible comment on the evidence is one of constitutional magnitude that may be raised for the first time on appeal State v. Levy, 156 Wash.2d 709, 132 P.3d 1076 (2006). Courts review jury instructions de novo, within the context of the jury instructions as a whole. A judge is prohibited by article IV, section 16 from conveying to

the jury his or her personal attitudes toward the merits of the case or instructing a jury that matters of fact have been established as a matter of law. Moreover, the court's personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied. Levy at 721.

In State v. Hagler, 150 Wash.App. 196, 208 P.3d 32, review denied 167 Wn.2d 1007 (2009), the Court of Appeals reviewed a situation where the trial court advised the jury at the outset of the case that the charged offenses were designated as "domestic violence" cases. The Court noted that under the statute, any crime committed against a family or household member may be charged as a domestic violence offense. RCW 10.99.020 The domestic violence designation does not alter the elements of the underlying offense. Hagler at 201. The Court concluded that advising the jury an offense is designated as a domestic violence offense is error. The Court said:

> The jury's task is to decide whether the State has proved the elements of the charges beyond a reasonable doubt. A domestic violence designation under chapter 10.99 RCW is neither an element nor evidence relevant to an element. The fact of the designation thus does not assist the jury in its task. We can see no reason to inform the jury of such a designation, and we believe that prejudice might result in some cases.

Hagler at 202

In this case, the Court permitted evidence to be introduced of prior assaultive incidents between Mr. Martin and Ms. Wilson. The Court then gave a limiting instruction that the evidence was being admitted "only for the purpose of understanding potential domestic violence and the victim's state of mind." There are several problems with this limiting instruction.

First, the jury never heard a definition of "domestic violence." There was a special verdict in this case where the jury was asked if the offenses occurred between "family or household members"but they were not told that offenses committed against family or household members are legally designated as domestic violence offenses RP, 404. Without a definition of domestic violence, the jury was left to speculate as to the intent of the limiting instruction.

Second, there was no expert testimony tying the charged offenses to the prior offenses as a pattern of domestic violence Courts have allowed expert testimony on this topic in some cases. State v. Grant, 83 Wash.App. 98, 920 P.2d 609 (1996). Without such expert testimony, there was no nexus between the charged offenses and the pattern of domestic violence allegedly demonstrated by the prior acts.

The trial court on the record cautioned that it did not want to comment on the evidence in the limiting instruction. RP, 325. But in the process, it fashioned a limiting instruction that did in fact comment on the evidence. The advisement in this case was much more egregious than the error in Hagler, where the error was found to be harmless. In Hagler, the Court simply advised the jury that the offense was a domestic violence offense. But in Mr. Martin's case, the judge instructed the jury to use prior acts of alleged assault for the "purpose of understanding potential domestic violence." The Court essentially made the pattern of domestic violence part of the evidence of the case and permitted the jury to allow the domestic violence to influence how they viewed the elements of the offense. This is precisely what Hagler cautioned was impermissible and prejudicial. The limiting instruction was an impermissible comment on the evidence and reversal is required.

4. The prosecutor's closing rebuttal argument falsely accusing defense counsel of accusing the victim of being a liar was flagrant and ill-intentioned prosecutorial misconduct.

It is well established that it is prosecutorial misconduct for a prosecutor to argue that the defense position is that State's witnesses are lying. The Court of Appeals explained the reason for this rule in State v.

Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d, review denied, 118 Wn.2d 1007 (1991), where the Court said:

> Lying is stating something to be true when the speaker knows it is false. As the word "lie" was used by the prosecutor, it meant giving testimony which the officer witness knew to be false for the purpose of deceiving the jury. The tactic of the prosecutor was apparently to place the issue before the jury in a posture where, in order to acquit the defendant, the jury would have to find the officer witnesses were deliberately giving false testimony. Since jurors would be reluctant to make such a harsh evaluation of police testimony, they would be inclined to find the defendant guilty. While such a prosecutorial tactic would be totally unavailing in a bench trial, we cannot be confident it would not be effective with some jurors. With the prosecutor persistently seeking to get the witnesses to say that the officer witnesses were lying, and doing so with the trial court's apparent approval, it is readily conceivable that a juror could conclude that an acquittal would reflect adversely upon the honesty and good faith of the police witnesses.

Casteneda-Perez at 360.

In this case, the prosecutor's rebuttal argument clearly accuses defense counsel of accusing the victim of lying. But defense counsel never made such an assertion. Defense counsel pointed out that Ms. Wilson never told law enforcement she had also been using cocaine. He pointed out it was only on the eve of an interview at the prosecutor's office that she admitted the cocaine use. He also pointed out she had given conflicting stories of how many cocaine lines she had snorted. But he never argued she was lying.

Defense counsel failed to object to the misconduct. Absent an objection, prosecutorial misconduct during closing argument is reversible error when the argument is so flagrant and ill-intentioned that an enduring prejudice resulted such that a curative instruction could not have been effective. State v. Gregory, 158 Wn.2d 759, 844, 147 P.3d 1201 (2006). In this case, the prosecutor's comments completely misstated defense counsel's argument. The prosecutor's arguments could have been interpreted by the jury as requiring they either find Ms. Wilson lied in her testimony or that Mr. Martin was guilty. In fact, the jury could have found her testimony believable but, viewed as a whole, insufficient to establish guilt beyond a reasonable doubt. The argument was flagrant and ill-intentioned. The fact that the improper argument was made during rebuttal argument, with no opportunity for the defense to respond, only serves to compound the prejudice. See State v. Powell, 62 Wn.App. 914, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992) (prosecutorial misconduct occurring during rebuttal argument is more likely to be prejudicial and flagrant).

5. Mr. Martin's multiple convictions for second degree assault and harassment constitute same criminal conduct.

Two offenses constitute the same criminal conduct when they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). In this case, the assault and harassment charges clearly occurred against the same victim and at the same place. Additionally, the threats were made as part of and during the assaultive attack, so they took place at the same time.

The only remaining issue is whether the threats and assault involve the same criminal intent. In construing the intent element, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Whether one crime furthered the other is relevant. Vike at 411.

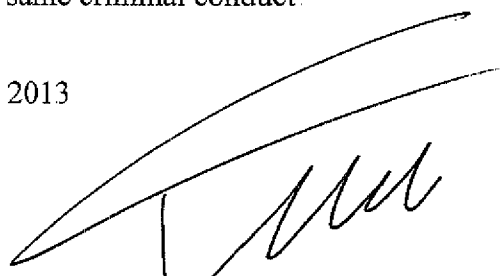
This case was charged and tried as a domestic violence case. The trial court admitted prior incidents of domestic violence pursuant to ER 404(b) because the court deemed the prior assaults to be part of a pattern of domestic violence. See State v. Olsen, 175 Wash.App. 269, 309 P.3d 518, (2013), (evidence of prior domestic violence admissible to show motive and intent) The legislature and the Courts have recognized that domestic violence is a unique and substantial problem in our society and frequently acts as the motive for a variety of offenses, including assault and homicide. See RCW 10.99.010; State v. Grant, 83 Wash.App. 98, 920

P 2d 609 (1996) (prior domestic violence and expert testimony admissible in domestic violence to explain behavior by domestic violence victim). The State's theory in this case was that Mr. Martin acted with a domestic violence motive and intent when he repeatedly attacked and threatened Ms Wilson. The domestic violence assaults furthered the domestic violence threats and visa versa. The two acts were committed with the same criminal intent. The two offenses should have been treated as same criminal conduct.

D. Conclusion

The second count of second degree assault and the fourth degree assault convictions should be dismissed as violating double jeopardy. A new trial should be ordered because the limiting instruction impermissibly commented on the evidence and was flagrant prosecutorial misconduct. A new sentencing hearing is required where the second degree assault and harassment charges should be deemed same criminal conduct.

Dated this 25th day of October, 2013



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. ERIC C. MARTIN, Defendant.	Clark County Cause No.: 12-1-01274-1 Court of Appeals No.: 44891-2-II AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness

On October 25, 2013, I sent an original, postage prepaid, BRIEF OF APPELLANT to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

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On October 25, 2013 I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Clark County Prosecutor's Office, PO Box 5000, Vancouver WA 98666-5000

On October 25, 2013 I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to Legal mail, Eric C. Martin, DOC # 366329, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

Dated this 25th day of October, 2013.

Thomas E. Weaver
WSBA #22488
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 25th day of October, 2013

Rebecca J Brown
Commission Expires
Notary
Public
02/25/2017
State of Washington

Rebecca J. Brown
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 02/25/2013

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